SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 77-34

EDWARD GRADY PARTIN,
DON MARIONNEAUX,
HUGH MARIONNEAUX,
and HAROLD SYKES,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION

McPHERSON & ABADIE
Peter J. Abadie, Jr.
James A. McPherson
419 Carondelet St.
New Orleans, LA 70130
[504] 581-1973

Attorneys for Petitioners

I N D E X

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PETITION

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Edward Grady Partin, Don Marionneaux, Hugh Marionneaux and Harold Sykes, through their undersigned counsel, respectfully petition this Honorable Court for a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit which was rendered in the proceedings below on May 19, 1977, and for a stay of the enforcement of the mandate pending these proceedings.

OPINIONS BELOW

The Fifth Circuit's opinion is reported at 552 F.2d 621 and is reprinted in full as Appendix A to this Petition.

The District Court's opinions relative to the issues presented by this Petition are not reported but are reprinted in full as Appendix B to this Petition.

JURISDICTION

The judgment of the Fifth Circuit was rendered on May 19, 1977. No petition for rehearing

was filed because counsel for petitioners was involved in the preparation for and the trial of another Federal case and allowed the time therefor to expire without filing same. Petitioners obtained a recall and stay of mandate from the Fifth Circuit, pending the timely filing of this Petition. Petitioners then sought and obtained a fifteen-day enlargement of time within which to file this Petition from Circuit Justice Lewis F. Powell, Jr., making this Petition due on or before July 5, 1977.[1] This Petition is filed within the time provided by Rule 22(2) of the Rules of this Honorable Court, as enlarged for cause shown to Circuit Justice Powell as aforesaid.

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1. The fifteen-day extension expires on July 3, 1977 (a Sunday). July 4, 1977 is a legal holiday (Independence Day). The time for filing this Petition for a Writ of Certiorari is therefore extended to July 5, 1977, pursuant to the provisions of Rule 34 of the Rules of this Honorable Court.

An application for a stay of the mandate of the Fifth Circuit was made to and granted by the said Court pending the filing of a timely application for a writ of certiorari. When an extension of time within which to file this Petition was obtained from Mr. Justice POWELL in his capacity as Circuit Justice for the Fifth Circuit, the Government, without service upon petitioners, filed a motion to revoke or recall the stay. Since then, all petitioners except Partin, who is scheduled for a retrial in August following the reversal of his conviction in the Court below, have been arrested. A stay of the enforcement of the judgment below is necessary in order to prevent a new trial from being instituted against petitioner Partin before this Court will have an opportunity to rule on this Petition, and in order to prevent the other petitioners from being forced to serve sentences to imprisonment before this

Court, now in vacation, will have an opportunity to rule on this case and to thereby restrain the wrongful imprisonment of these petitioners.

Petitioners are each willing to post bonds within their means if the bonds upon which they were heretofore enlarged pending this application are deemed to be insufficient.

This Court's jurisdiction to review this case on petition for a writ of certiorari is invoked pursuant to 28 U.S.C. §1254(1). Circuit Justice POWELL has jurisdiction to grant a stay of the enforcement of the judgment pending the review of this case, as does the Court *en banc* or any other Justice to whom same should be submitted during the vacation of the Court. Rule 27, Supreme Court Rules. Petitioners invoke that authority with respect to the application for a stay pending proceedings herein with respect to this Petition for a Writ of Certiorari.

QUESTIONS PRESENTED

1. Whether the doctrine of statutory construction known as *ejusdem generis* applies to a prosecution under 18 U.S.C. §1503's "due administration of justice" clause, and by virtue of its application to §1503, apply to a prosecution for an alleged conspiracy (18 U.S.C. §371) to obstruct justice in violation of §1503; and, if so, whether those statutes can be utilized to prosecute alleged acts which would constitute an offense under the subornation of perjury statute, 18 U.S.C. §1622.

2. Whether, after the judgments in the cases of petitioners Don and Hugh Marionneaux and petitioner Harold Sykes had been reversed by the Fifth Circuit, especially when their trials represented the sixth and seventh successive trials before Honorable Nauman S. Scott, United States District Judge, of the various charges made

in the indictment herein, Judge Scott abused his discretion when he refused to withdraw or recuse himself upon the subsequent retrials of this case pursuant to the authority of *United States v. Simon,* 393 F.2d 90 (2 Cir. 1968).

3. Whether, after a number of trials in a jurisdiction to which venue had been changed because of local prejudice, when there had been large scale news coverage following each of the trials held in the venue to which the prosecution had been changed, petitioners were denied due process of law when the Trial Court overruled their several motions for a change of venue and subsequently relied upon the answers of prospective jurors on *voir dire* examination to determine that the said prospective jurors could put aside any prejudices or conclusions they might have had and that they could accord defendants a fair trial.

CONSTITUTIONAL AMENDMENTS AND STATUTES INVOLVED

This case involves the Fifth Amendment Due Process Clause; 18 U.S.C. §§ 371, 1503 and 1622; Rule 21(a), F.R.Cr.P.; and various jurisprudential rules made under the supervisory authority of appellate courts over the conduct of trials in the United States District Courts.

The Due Process Clause of the Fifth Amendment to the United States Constitution provides:

> No person shall * * * be deprived of life, liberty, or property, without due process of law * * *.

Title 18, United States Code, §371 provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Title 18, United States Code, §1503 provides:

> Whoever corruptly, or by threats or force,

or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate or other commiting magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any officer, magistrate, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

Title 18, United States Code, §1622 provides:

> Whoever procures another to commit any perjury is guilty of subornation of perjury,

> and shall be fined not more than $2,000 or imprisoned not more than five years, or both.

Rule 21(a), Federal Rules of Criminal Procedure, provides:

> The court upon motion of the defendant shall transfer the proceeding as to him to another district whether or not such district is specified in the defendant's motion if the court is satisfied that there exists in the district where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial at any place fixed by law for holding court in that district.

STATEMENT OF THE CASE

This case is based on an indictment alleging three separate counts of conspiracy to obstruct justice.

The first alleged conspiracy was a conspiracy at first to hide one Richard A. Baker and thereby aid him in avoiding a grand jury subpoena which was returnable on October 5, 1972, and which subsequently allegedly turned to a conspiracy to induce Baker to commit perjury at a trial of

Edward Grady Partin in Houston, Texas, on charges of obstructing justice in connection with an antitrust criminal prosecution.

The second alleged conspiracy was a conspiracy to persuade a witness against Partin, in the case tried at Houston, not to testify and by rendering that witness, Claude W. Roberson, sustenance and transportation to avoid his appearance as a witness at the said Houston trial.

The third alleged conspiracy was a conspiracy to cause Richard A. Baker to change his testimony given to a federal grand jury in the Middle District of Louisiana following the Houston trial. At the Houston trial, Baker testified that he had not heard Partin threaten a federal witness in the antitrust case, Wade McClanahan, as he had testified before a grand jury in New Orleans which then indicted Partin for obstruction of justice (the charge which was subsequently tried in the

Court at Houston, Texas). At the grand jury later, Baker also testified that he had lied in the Houston trial when he testified that Don Marionneaux had not given him $500, but had merely loaned him $75, at the time Baker gave a written statement to attornies for Partin who met Baker in Pittsburg, Pennsylvania, prior to the scheduled trial in Houston, Texas.

The Fifth Circuit, at different times on various appeals by the several defendants named in this three-count indictment, has reviewed the evidence and found it to have been sufficient to prove the alleged conspiracies to obstruct justice. *See United States v. Brasseaux*, 509 F.2d 157 (5 Cir. 1975); *United States v. Marionneaux*, 514 F.2d 1244 (5 Cir. 1975); and *United States v. Partin*, 552 F.2d 621 (5 Cir. 1977). Since the issue presented by the first Question Presented is a legal one, based on the terms of the offense

purportedly stated in the indictment, the evidence is not discussed herein.

J. Roy Brasseaux was the first defendant who was tried on the various counts of the indictment herein. Judge Scott presided that one-week trial in June of 1974. In that trial, the Court charged the jury that, once the existence of the conspiracy had been proved, only "slight evidence" is necessary to prove a person's membership in the conspiracy. At the Brasseaux trial, counsel recognized the potential for damage from the Government's proposed charge. The Government, however, had cited numerous Fifth Circuit opinions in support of the proposition. Counsel read the various opinions cited by the Government, found that the cases said what the Government said they did, and declined to object to the "slight evidence" charge in that case. Following that trial, when trying to analyze why the charge should not

have been allowed, it occurred to counsel that the charge given by the Court was actually the standard to be applied by District Courts in adjudicating motions for a judgment of acquittal and by appellate courts in reviewing the denial of such motions. In all the subsequent trials upon this indictment, an objection was made to the "slight evidence" charge. On the Brasseaux appeal, it was argued that the said instruction was "plain error" within the meaning of Rule 52(b) of the Federal Rules of Criminal Procedure, because it unconstitutionally contravened the defendant's right not to be convicted except on proof beyond a reasonable doubt. The Fifth Circuit disagreed that it was "plain error," while recognizing that such a charge was erroneous. *United States v. Brasseaux, supra.* Brasseaux's conviction was affirmed.

The next trial of this indictment which was

tried before Judge Scott was that of Jerry Thomas. He was tried and acquitted in Shreveport, Louisiana, in July of 1974.

The convictions of Hugh and Don Marionneaux, Ben Trantham (now deceased), and Harold Sykes, obtained before Judge Scott in August of 1974, were subsequently reversed upon two grounds: the "slight evidence" charge and the misjoinder of the defendants between the first and second conspiracy counts. *United States v. Marionneaux, supra.*

Edward Grady Partin was next tried before Judge Scott. He was tried in February and March of 1975, which trial ended in the conviction which is now before this Court. The Court again gave the "slight evidence" charge, which was made the basis for the reversal of his conviction by the Court below. *United States v. Partin,* 552 F.2d 621 (5 Cir. 1977). Because petitioner Partin's objection to the indictment was rejected on his

appeal, petitioner seeks certiorari from this Honorable Court notwithstanding that the judgment of the Trial Court has been reversed.

O. Romaine Russell, who is not a party to this Petition but whose conviction was affirmed in the proceedings below, was tried before Judge Scott in May and June of 1975, after the Fifth Circuit's opinion in the *Brasseaux* case, *supra.*

The retrials on the indictment commenced in July of 1975, first with the trial of the Marionneaux brothers and Joe Green, and then with the trial of Harold Sykes. It was not until the commencement of the retrials that any defendant moved for Judge Scott to withdraw from this case pursuant to the ruling of the Second Circuit Court of Appeals made in *United States v. Simon,* 393 F. 2d 90 (2 Cir. 1968). Judge Scott refused to withdraw. In support of their position that Judge Scott should withdraw pursuant to their request,

petitioners showed the Court that, following the mistrial of Partin in Butte, Montana, in 1971, the Government had moved for Judge William D. Murray, Senior United States District Judge, to withdraw pursuant to the authority of the *Simon* case. Judge Murray withdrew. Petitioners also showed that District Judge James F. Battin, who presided the Partin antitrust retrial in Atlanta, Georgia, after the mistrial in Butte, withdrew *sua sponte* following that trial, citing the *Simon* case as his authority for doing so. Judge Battin entered several judgments of acquittal as to all but one count of the five-count antitrust indictment and ordered a retrial on the fifth count because of the substantial prejudice which was inherent from the evidence adduced as to the other four counts. District Judge Manuel Real was then designated to preside the retrial. He is from Los Angeles, California. The judgment rendered

by Judge Real was also reversed by the Fifth Circuit. *United States v. Partin,* 493 F.2d 750 (1974). Prior to Judge Scott's refusal to withdraw, Judge Real was the only judge in any of the numerous Partin-related trials to refuse to withdraw after a new trial had been ordered. Judge Scott considered that, as to the Partin-related cases, the precedential value of the withdrawals by Judges Murray and Battin was broken. Other reasons were assigned by him and appear in Appendix B to this Petition.

With each trial of this indictment, there was a wave of publicity. Five of these trials or retrials occurred in Shreveport, Louisiana, all in a one-year period (July 1974 to July 1975). The reversals of the judgments were highly publicized in the Shreveport papers immediately before the retrials commenced. This case was a news item in the Shreveport area of no small proportion. Yet,

on *voir dire* examination of the prospective jurors, many professed to have had no knowledge of the case and the previous verdicts, and those who did admit having heard of the case declared that they could put aside any preconceptions about the case and render an impartial judgment based solely on the evidence presented during this trial. Motions for changes of venue for the retrials were then denied and the retrials were had in Shreveport.

Following the decision of the Court below in this case, Judge Scott set the Partin retrial before him in August of 1977. A stay of mandate which had been previously issued was apparently recalled. The Government filed a motion for the stay to be recalled or set aside, which has never served on undersigned counsel. Counsel has not been able to obtain a copy of any order revoking the stay previously issued, yet all petitioners except Partin, who is scheduled for retrial, have

been arrested.

REASONS WHY THE WRIT SHOULD BE GRANTED

1. The decision below conflicts with opinions of the Sixth and Ninth Circuit Courts of Appeals regarding the applicability of the Doctrine of *ejusdem generis* to prosecutions under the "due administration" clause of 18 U.S.C. §1503, and the decision below conflicts with applicable decisions of this Court.

The issue in the Houston trial was whether or not Edward Grady Partin had threatened Wade McClanahan with violence if McClanahan testified against Partin in the antitrust criminal case. Richard A. Baker, after having testified before the grand jury which indicted Partin for obstruction of justice that Partin had threatened McClanahan, recanted that testimony before the jury in Houston. That, however, was not the basis for the charge that petitioners conspired to induce Baker to commit perjury. Rather, the answer on cross-examination by the Government that Don Marionneaux had not given Baker $500 but had only loaned him

$75 in Pittsburg, Pennsylvania, where a formal statement was taken from him by a former United States Attorney and Jerry Milican, a Teamster attorney, was charged to have been induced by defendants.

Richard Baker had a companion, Sam Howard, with him in Pittsburg when he called Partin and told him that the Government had approached Baker and told him that the Government wanted him to testify against Partin in Houston, Texas. Baker confessed to Partin on the telephone that he had committed perjury before the grand jury that indicted Partin but that he was willing to give a statement recanting that testimony. Millican and Don Marionneaux went to Pittsburg, met with Baker and took him to the office of a former United States Attorney who was then in private practice and secured a notarized statement from Baker recanting his false testimony before the

grand jury. Baker invited himself to return to Baton Rouge with Millican and Marionneaux after his statement was taken. Marionneaux paid the air fare for Baker back to New Orleans and he drove to Baton Rouge, Louisiana, with Baker and Millican. Baker was later lodged in a motel room in Baton Rouge under an assumed name.

The present prosecution proceeds upon the assumption that the petitioners somehow knew that the Government was aware of the statement given by Baker in Pittsburg and all about everything relating to that. There was no proof that the petitioners ever knew of the existence of a companion in Pittsburg who knew what was going on. *A fortiori*, there was no reason for them to have anticipated that Baker would be cross-examined on whether or not Don Marionneaux had given him any money at the time his statement was given. When the question was asked on cross-examination, the

answer was Baker's own answer, unsolicited by the petitioners. It is true that the petitoners, Hugh and Don Marionneaux and Edward Grady Partin, had something to do with producing Baker to testify that he had not heard Partin threaten McClanahan. But even the Government does not now claim that testimony was perjured.

Petitioner Partin raised the issue in the Court below as one of insufficient proof of the charges made in the indictment. The other petitioners (except Sykes, to whom neither Count I nor Count III relates) raised the issue on a motion to dismiss the indictment. Partin had also joined in that motion to dismiss. The Court below considered the question as one of the sufficiency of the indictment. It held "that the indictment, charging violation of the due administration clause, was sufficient." 552 F.2d at .

In *United States v. Essex,* 407 F.2d 214 (6 Cir.

1969), the Court held that one who commits perjury in a judicial proceeding does not, by that fact alone, violate the "due administration" clause of §1503. This decision was reached by applying the statutory construction doctrine known as *ejusdem generis*. Since the acts proscribed in the preceding specific clauses had been directed toward individual participants, the *Essex* court held that obstruction of the "due administration of justice" must also be limited to acts directed against individual participants. Similar results, applying the same doctrine of statutory construction, were reached in *United States v. Metcalf,* 435 F 2d 754 (9 Cir. 1970); *Haili v. United States,* 260 F.2d 744 (1968).

The commission of perjury in judicial proceedings is proscribed by 18 U.S.C. §1623. The subornation of perjury is proscribed by 18 U.S.C. §1622. It was petitioners' contention in the Court below that §§1503, 1622 and 1623 must be construed

in pari materia, and that if perjury was not a violation of the "due administration" clause of §1503, then neither was subornation of perjury. If it were held to be otherwise, then the Court would have relegated §1622 to be a nullity as nothing more than a redundancy of the obstruction of justice statute.

The Court below recognized that there is a conflict among the Circuits on the question of the applicability of *ejusdem generis* to §1503 prosecutions (552 F.2d at):

> Even assuming that the *Essex* court was correct, *but see United States v. Cohn*, 452 F.2d 881 (2 Cir. 1971), *cert. den.*, 405 U.S. 975 (1972), it does not follow that one who endeavors to induce another to commit perjury does not violate the "due administration" clause. * * *
>
> The *Essex* court properly recognized 18 U.S.C. §1503 to be a contempt statute. Sections 1622 and 1623 are not.

In *Ex parte Hudgings*, 249 U.S. 378 (1919),

this Court recognized that perjury does not constitute a contempt of court and that it does not possess an element obstructive to the performance of judicial duty. This Court, in *Hudgings*, was presented with the question whether a person guilty of perjury committed in open court could on that account be punished for contempt. In answering the question in the negative, this Court said (249 U.S. at 383-384):

> An obstruction to the performance of judicial duty resulting from an act done in the presence of the court is, then, the characteristic upon which the power to punish for contempt must rest. This being true, it follows that the presence of that element must clearly be shown in every case where the power to punish for contempt is exerted—a principle which, applied to the subject in hand, exacts that in order to punish perjury in the presence of the court as a contempt there must be added to the essential elements of perjury under the general law the further element of obstruction to the court in the performance of its duty. * * * It is true that there are decided cases which treat perjury, without any other element, as adequate to sustain a punishment for

> contempt. But the mistake is, we think, evident, since it either overlooks or misconceives the essential characteristic of the obstructive tendency underlying the contempt power, or mistakenly attributes a necessarily inherent obstructive element to false swearing. * * *

Of course, there are contempts of court which may take place outside the presence of the court. These, this Court has held, are not subject to the exercise of summary powers as are contempts committed in the presence of the Court. The point of this, we submit, is that the solicitation of false testimony outside the presence of the court, in order to support a conviction under the "due administration" clause of §1503, would necessarily have to import into that statute the belief, which this Court rejected and said to be mistaken, that perjury is inherently obstructive. *See Ex parte Hudgings, supra,* at 383-384.

The "due administration" clause is not to be construed with regard to the ultimate objective of the judicial proceeding. Rather, it must be construed that the "due administration" clause relates to the individual functions along the way to reaching that goal. In *In re Michael,* 326 U.S. 224 (1945), this Court considered a contempt conviction of a grand jury witness who allegedly gave "false and evasive" testimony which was alleged to Have "obstructed the said grand jury in its inquiry and the due administration of justice." This Court there said (326 U. S. at 227-228):

> All perjured relevant testimony is at war with justice, since it may produce a judgment not resting on truth. Therefore, it cannot be denied that it tends to defeat the sole ultimate objective of a trial. It need not necessarily, however, obstruct or halt the judicial process. For the function of trial is to sift the truth from a mass of contradictory evidence, and to do so the fact finding tribunal must hear both truthful and false witnesses.

The "due administration of justice" was held not to have been obstructed by the false testimony in

the *Michael* case because "the function of trial is to sift the truth from a mass of contradictory evidence"; the giving of false testimony does not obstruct or halt the judicial process.

There are adequate sanctions for the giving of false testimony and for the solicitation of false testimony in 18 U.S.C. §§1623 and 1622, respectively. These acts, while contemptible, are not obstructive of the judicial process, an essential element to a charge under 18 U.S.C. §1503. They invoke the judicial process in the same way as any other false testimony and it should not make any difference, so far as the applicability of the statute is concerned, whether the underlying act is perjury or subornation of perjury.

For these reasons, we respectfully submit that the indictment, which alleged as a part of the obstruction of justice that petitioners induced Baker to testify falsely, was defective, as the

charge in such a case, if true, would have properly been a conspiracy to suborn perjury.

Since there were two alleged objectives of the conspiracy, one of which did not constitute a violation of §1503, there was a general verdict which could have easily turned upon this allegation which has been discussed above and there is no way to conclude that it did not, the petitioners are entitled to a dismissal of the second alleged objective of the alleged conspiracy to obstruct justice and to a reversal of the convictions potentially based upon such a defective charge.

Since Count III suffers the same vice as Count I, both must be dismissed so far as it is alleged that petitioners conspired to obstruct justice by suborning perjury.

2. The judgment below conflicts with the opinion of the Second Circuit, made in *United States v. Simon,* 393 F.2d 90 (2 Cir. 1968), and

this Court should grant this Petition in order to resolve the conflict among the Circuits in this matter.

The Statement of the Case, *ante*, p. 13 *et seq.*, demonstrates the extensive participation in this case by the Honorable Nauman S. Scott, United States District Judge. Judge Scott had himself been assigned to preside this case by Chief Judge Brown of the Fifth Circuit after the Honorable E. Gordon West, Chief Judge of the Middle District of Louisiana, withdrew from the case.

Judge Scott presided the following trials upon this indictment:

1.	Brasseaux	June 1974	Baton Rouge
2.	Jerry Thomas	July 1974	Shreveport
3.	Hugh Marionneaux, Don Marionneaux, Ben Trantham, Harold Sykes, and Crockett Carleton	Aug. '74	Shreveport
4.	Edward Grady Partin	Feb.-Mar. 1975	Shreveport

5.	O. Romaine Russell	May-June '75	Alexandria
6.	Hugh Marionneaux Don Marionneaux Joe Green	July 1975	Shreveport
7.	Harold Sykes and Ben Trantham	July 1975	Shreveport

The sixth and seventh trials were the result of reversals in the third trial. *United States v. Marionneaux,* 514 F.2d 1244 (5 Cir. 1975).

It was not until the retrials that petitioners moved that Judge Scott withdraw on the basis of the holding in *United States v. Simon,* 393 F. 2d 90 (2 Cir. 1968). Significantly, the Government had invoked the *Simon* case to get rid of Judge W. D. Murray in the original case from which the present case stems. Judge James F. Battin, assigned to replace Judge Murray in the original criminal antitrust case, followed suit after entering judgments of acquittal on four of the five counts in the antitrust indictment and

granted a new trial as to the remaining count of that indictment. When the Government succeeded in getting a conviction of Partin which was not upset by the trial judge, the Government opposed a motion made by the defense on the same authority as had the prosecution previously used when that judgment was reversed by the Fifth Circuit.

Judge Scott assigned the following reasons for denying the motion that he withdraw from this case:

1. The Simon case was not binding upon him as a judge sitting in the Fifth Circuit. The Simon case was decided by the Second Circuit.

2. The Simon case should be restricted to its particular facts, citing *Wolfson v. Palmieri,* 396 F.2d 121 (2 Cir. 1968).

3. The Fifth Circuit, in *Smith v. United States,* 360 F.2d 590 (5 Cir. 1966), indicated that a trial judge is competent to hear a retrial

of the same case.

4. The precedential value of the withdrawals of Judges Murray and Battin was destroyed by the refusal of Judge Real to withdraw, thus upsetting the pattern of judicial activity in the various Partin retrials.

5. Judicial time and economy would require that he, already familiar with the facts and legal issues, continue to preside the case since the delay, resulting from his withdrawal, would seriously jeopardize the opportunities for a just and speedy retrial.

The *Simon* case, decided under the Second Circuit's supervisory power over District Courts in that Circuit, was based upon sound considerations of fairness and a recognition that subtle influences upon judicial behavior may result after a reversal of rulings made in a previous trial and should be avoided by eliminating the

circumstances which foster potential judicial unfairness. That the *Simon* case was a Second Circuit opinion was no good reason for refusing to be persuaded by its reasoning and sense of fairness.

The opinion in *Wolfson v. Palmieri, supra,* contrary to the opinion of the Trial Court, did not restrict the opinion made in *Simon;* it only refused to extend the relief ordered in situations comparable to that presented by the *Simon* case to factually different situations. The Court, in *Wolfson v. Palmieri, supra,* at 126, wrote:

> Much reliance is placed by petitioner on *Simon,* which *involved the retrial* of the *same case* by the *same judge.* That decision, as all these decisions must be, was based upon the particular facts there presented. To *extend* the *rule there announced* to the *different charges* against the *same defendants* would take this court much too far into problems necessarily left to the good judgment of the district judges. (Emphasis added.)

This case, as did *Simon,* involved the retrial of the same case by the same judge, the identical factual considerations upon which the *Simon* court predicated its rulings. No defendant in this case grounded his motion for the withdrawal of Judge Scott upon anything other than that he had participated in the same case against them which had been reversed by the Fifth Circuit. No extension of *Simon* was requested—only its application.

In cases involving the retrial of the same case, *Simon* alleviated the necessity that defendants file affidavits pursuant to 28 U.S.C. §144 alleging the "personal," non-judicial prejudice of a district judge. It assumed that, in cases where other district judges are available, the appearance of justice, if not justice itself, required that the original trial judge withdraw. *Wolfson* did not change that. That case only de-

cided that the principles of the *Simon* case would not be extended to cases involving the same defendants upon different charges. Implicit in the language of *Wolfson* is the directive that *Simon* be followed in cases involving the retrial of the same defendants on the same charges.

The correctness of Judge Real's ruling was never tested. Other rulings were. *United States v. Partin,* 493 F.2d 750 (5 Cir. 1974), *reh. den.,* June 5, 1974. The fact the Government first sought application of the *Simon* rule should have, in all fairness, estopped the Government from opposing its application on behalf of Partin when he invoked it. *Simon,* like any other rule of law, must apply equally to both parties. The Government enjoys no superior right to get rid of a judge who has previously ruled favorably to its opponent. We respectfully sub-

mit that Judge Real's ruling had no precedential value and should not have been followed.

We respectfully submit, as the Second Circuit apparently perceived, that the retrial of a case before the same judge who has been reversed for rulings made in the previous trial is conducted in a different manner than an original trial. The judge, having formulated his own ideas of the issues to be tried, tends to conduct a severely limited trial the second time around—— the fewer issues, the less likely he is to be reversed a second time. Notwithstanding that the evidence presented in the second trial may not be as adequate as it originally was, he is predisposed to deny motions for a judgment of acquittal because he has previously determined that the evidence is adequate to support a finding by a jury that defendant(s) are guilty. The restrictions upon retrial are most felt by the

defense, since the Court by then has conceived a theory of what is relevant to his defense and does not wish to have the issues broadened and take more time than is absolutely necessary. The apparent attitude, when the defense attempts to cross-examine witnesses on broader grounds than before, is, "The defendant is guilty. Why go into that?" While these words are not necessarily spoken (but sometimes they are), the impact of the underlying attitude is felt in every attempt to deviate from the evidentiary pattern which the original trial judge has preconceived should determine matters of relevance and materiality.

It was these subtle influences at retrials which formed the basis for the Court's opinion in *Simon*. The avoidance of such an effect upon retrials throughout the Federal Court system should likewise prompt this Court to grant the writ in

this case to consider this issue which has not been heretofore decided by this Court. We know of no limitation upon this Court to grant writs to make rulings on issues within the supervisory power of this Court. We respectfully submit that in the matter presented the exercise of this Court's power of supervision over the lower courts is called for.

The final reason cited by the District Court, *i.e.*, judicial time and economy, was answered by the *Simon* court (393 F.2d at 91):

> We believe that at least in a multi-judge district such as the Southern District of New York where the necessity of retrial before the same judge is not present, the practice of retrial before a different judge is salutary and *in the public interest, especially as it minimizes even a suspicion of partiality*. Because we believe that this *outweighs any considerations of judicial economy and convenience*, we hold that it is the wiser practice, wherever possible, that a lengthy criminal case be retried before a different judge unless all parties request that the same judge retry the case. * * * (Emphasis added.)

In this case, a change of venue had been granted because of local prejudicial publicity in the original venue. The judge of the Court of original venue had withdrawn. Judge Scott was appointed by the Fifth Circuit as a judge *ad hoc* of the Middle District of Louisiana. Following the change of venue, even this was not necessary in order to have another judge conduct the retrial. Virtually every other Federal judge in Louisiana, except Judge West who had previously withdrawn, was available to conduct the retrials. There are nine judges in the Eastern District of Louisiana and, at the time of the motion in the Trial Court, there were three other judges in the Western District of Louisiana. In the Partin antitrust case, two judges from Montana and one from California were called upon to preside trials in New Orleans, Atlanta and Butte, Montana. In the obstruction of justice case relating to the antitrust indictment, a New Orleans

Federal judge, Honorable Herbert W. Christenberry (now deceased) went to another State to preside the trial. In this case, all of the District Judges of the United States were potentially available since there were no venue considerations which would have required that this case be tried in Louisiana.

There was yet one other reason why Judge Scott should have withdrawn. Judge Scott accepted a change of plea from a co-defendant, Jack P. F. Gremillion, Jr., in January of 1975— one full month before the trial of Partin in February and March of 1975. The Court withheld sentencing Gremillion until after he had testified against Partin. This coercive participation by Judge Scott in the securing of Gremillion's favorable testimony against Partin demonstrated something less than impartiality.

The Court below, refusing to follow the rule

of the *Simon* case, held that "[i]n the absence of such allegations and showing ["that Judge Scott harbored a personal bias that would disqualify him"], * * * it was not error for him to deny the motion to recuse." 552 F.2d at . In essence, the Fifth Circuit held that 28 U.S.C. §144 was the only recognizable means whereby a defendant might move to have a judge replaced.

We respectfully submit this holding was incorrect and sanctioned a departure from just procedures in the United States District Courts which call for the exercise of this Court's power of supervision over the lower courts. Since this issue has not previously been decided by this Court, we respectfully submit that is further grounds for this Court to grant the writ.

3. The opinion below is decided in a way in conflict with applicable decisions of this Court and in conflict with decisions of other Courts of the United States.

The numbers and locations of the various trials of the indictment in this case have been set forth previously. The retrials of the petitioners, except Partin, were the fourth and fifth trials of this indictment in Shreveport. The Fifth Circuit reversed the first conviction for several reasons. *United States v. Marionneaux,* 514 F.2d 1244 (5 Cir. 1975). Judge Scott did not even wait to receive the mandate of the Fifth Circuit before he scheduled the retrial of the petitioners. In fact, with the mandate stayed until only recently in this case, Judge Scott has already scheduled the retrial of Petitioner Partin.

The first trial of the petitioners other than Partin had occurred only eleven months prior to their retrial. The first trial lasted six days in Shreveport. Attendant to any trial which lasts six days in a Federal court is some degree

of publicity. Standing alone, we would not suggest that the ordinary degree of publicity eleven months before retrial would be prejudicial to the defendants on retrial. But that publicity did not stand alone. In February and March of 1975, there was a trial of Edward Grady Partin which extended over a period from February 10th until March 4, 1975—nearly a full month. The publicity during that trial was commensurate with the reputation and notariety of the defendant there. Ed Partin is a labor leader in Louisiana who is as well known to Louisianians as is George Meaney. He is the labor leader who testified for the Government in the Hoffa case. The trial of Partin had been concluded for only three and a half months when the newspapers revealed that the Fifth Circuit had reversed the convictions of the petitioners. And, to make matters worse, Petitioner Sykes' retrial was the second trial after

the reversals and commenced on the heels of the conclusion of the retrial of the Marionneaux brothers, just as the effects of the publicity of the Marionneaux brothers' reconviction.

There was intermittent intense publicity in the Shreveport area for one full year, from July 1974 until July 1975.

No evidentiary showing of the degree and content of the publicity over this period was made in this case. But Judge Scott was well aware of its scope and nature. A substantial showing was made by co-defendant Gremillion, before he pleaded guilty, of the publicity in the Baton Rouge newspapers. In the Shreveport newspapers, after the commencement of this battery of trials, the area from which the petit jury was selected was saturated with reports of the evidence adduced in each trial as well as the various results. And the acquittal of Jerry Thomas, Crockett Carleton

and Joe Green was not found to be nearly as newsworthy as the convictions of their co-defendants.

The *voir dire* examinations of the various jurors who were selected to try this case was not transcribed. To the best of counsel's recollection, those few who admitted having heard about the former trials in the previous eleven-month period stated they could put aside any preformed opinions and could give defendants a fair trial. But, in these circumstances, can a juror's declaration of an ability to be impartial override the logical inferences that he knew of the past judgments and would therefore find it easier to render another guilty verdict?

In *Irvin v. Dowd,* 366 U.S. 717, 728 (1961), a case concededly involving greater and more prejudicial publicity than that with which this case is involved, this Court recognized that courts

cannot depend exclusively upon the jurors' answers on *voir dire*. The totality of the circumstances must be reviewed.

In *Wansley v. Slayton,* 487 F.2d 90 (4 Cir. 1973), the Court said the factors to be considered on a motion for a change of venue based on prejudicial publicity are whether the publicity is recent, whether it is widespread, and whether it is highly damaging to the defendant. Here, the publicity was intermittently intense over a one-year period. It was as recent as a week or two prior to these retrials. The media coverage, *i.e.*, newspapers, radio and television, saturated the entire surrounding area in which the prospective jurors resided. And what can be more prejudicial to a defendant on trial than for a juror to know that his co-defendants have been convicted of these same charges by another jury—unless it is that they should know that he

has been.

It would not have been unusual for the Court to have moved the trial to another site in the same District. *E.g., see United States v. Lewis,* 504 F.2d 92 (6 Cir. 1974), where it was treated as being the ordinary thing to have a retrial in a different Division of the District than that in which the original trial was had. There is no fixed rule requiring transfer, but retention of the trial in the original court is not mandated, either, especially where the situs of the original trial was transferred because of prejudicial publicity and, after several trials in the jurisdiction to which the case was transferred, the public there was no less aware of the charges, and even the results, than were the prospective jurors in the original district.

Even if the frequent publication in the leading newspaper of general circulation within

northwestern Louisiana of the evidence adduced in four subsequent trials, the expansive treatment of the convictions of certain co-defendants and an almost piercing silence regarding the various acquittals in the same news media is not a sufficient showing of local prejudice of the nature required under Rule 21(a), F.R.Cr.P., the potential for public prejudice following such a succession of trials and publicity should have been an adequate, even a mandatory, basis for a transfer in the interest of justice pursuant to Rule 21(b), F.R.Cr.P. There were no witnesses or counsel from Shreveport. The judge was from Alexandria, Louisiana. The balance of convenience (or inconvenience) to the parties was equal in any other Division of the Western or Eastern District of Louisiana (although perhaps Alexandria was justifiably disregarded because of the recent trial of defendant Russell with its attendant

publicity), if it did not favor the transfer to such other Division. Moreoever, one attorney for the Government and defense counsel were both from the Eastern District of Louisiana. There were no venue considerations involving Shreveport, since that location resulted from a change of venue having previously been granted.

It was not as though defendants sought a transfer out of the Fifth Circuit, which might have caused additional litigation with results contrary to those issues decided by the previous appeal of this case. *See United States v. Foster,* 33 F.R.D. 506, 509 (D.Md. 1963). The only special consideration regarding Shreveport was that it was the site of retrial ordered by Judge Scott. For him to have based his refusal to transfer on that sole consideration was arbitrary and capricious and constituted an absolute abuse of judicial discretion.

This Court has not heretofore decided when a transfer to another District or Division of a United States District is required in the interest of justice, either under a concept of local prejudice *per se* or in a context based upon the appearance of injustice. This case, presenting a succession of previous trials of numerous defendants in the same indictment and retrials of several of those same defendants in this same Division of the Western District of Louisiana, is such a case that should appeal to this Honorable Court as a vehicle for establishing guidelines for the lower courts of the United States because it has all the elements which could be practically expected to occur in any given situation. Moreover, the important federal question presented by this case is one of the nature which should be decided by this Court. The decision of the Court below has sanctioned a departure from the ordinary course

of judicial proceedings, *see United States v. Lewis*, 504 F.2d 92 (6 Cir. 1974), that the exercise of this Court's power of supervision is called for.

CONCLUSION

For the foregoing reasons, this Court should grant a writ of certiorari and review the judgment below. It should grant a stay of the enforcement of the mandate pending the review and disposition of this case.

Respectfully submitted,

McPHERSON & ABADIE
Attorneys at Law
419 Carondelet Street
New Orleans, Louisiana
70130
Telephone: [504] 581-1973

By_____
PETER J. ABADIE, JR.
Member of Supreme Court
Bar

JAMES A. MC PHERSON
Court Appointed Attorney
for Petitioner Sykes

CERTIFICATE

I, Peter J. Abadie, Jr., attorney for the petitioners herein and a Member of the Bar of the Supreme Court of the United States, hereby certify that on the 5th day of July, 1977, I served a copy of the foregoing Petition for a Writ of Certiorari on the parties thereto, as follows:

On the Solicitor General of the United States by first class mail, air mail prepaid, by mailing same to his office in the Justice Department, Washington, D. C.

All parties required to be served have been served.

PETER J. ABADIE, JR.